No. 89-1493

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,
v.
JOSEPH E. O'NEILL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

HAROLD G. LEVISON
Counsel of Record
MICHAEL C. HARWOOD
MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, NY 10038
(212) 510-7000

DAVID SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner Air Line Pilots Association

Of Counsel:
GARY GREEN
1625 Massachusetts Ave., N.W.
Washington, D.C. 20036

JOHN A. IRVINE
921 Main Street
Houston, TX 77012

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF FOR THE PETITIONER

I. THE LEGAL STANDARD

The brief of the Solicitor General as *amicus curiae* frames the threshold question posed in this case through the argument that the duty of fair representation should be understood to encompass two distinct duties: a "duty of loyalty" and a "duty of care." U.S. Br. at 8, 13. Plaintiffs—respondents in this Court—align themselves with the Solicitor General in this regard. *See* Resp. Br. at 18. Our contention, *per contra*, is that the representational duty implied from the Railway Labor Act's grant of exclusive representational authority is a unitary duty of *fair* representation, akin to a duty of loyalty that does not provide for a duty of *adequate* representation, akin to a duty of care. The difference between these alternative positions is well illustrated by the facts of this case.

We begin from the premise that a "duty of loyalty" is implicated by a claim—quite common in fair representation litigation—that a union has entered into an agreement that favors some members of the bargaining unit and disfavors others. Thus, as we stated in our opening brief (at 24-25), we agree that insofar as plaintiffs contend that the settlement agreement between ALPA and Continental improperly disadvantaged one group of pilots, the claim may be judicially cognizable. Adjudicating such a claim turns on the union's *basis* for distinguishing that group from others. That is so because the duty of loyalty does not allow a union to make such distinctions on *irrelevant or invidious* grounds. *See* Pet. Br. at 22-25.[1]

Plaintiffs' fundamental complaint here, however, does not turn on the differential—and disadvantageous—treatment of one group of unit members; rather, plaintiffs'

[1] In Parts II A2 and II B5, *infra*, we demonstrate that plaintiffs' complaints concerning the differential treatment of strikers and permanent replacements in the strike settlement agreement do not support a duty of fair representation claim, because such differential treatment was not based on irrelevant or invidious grounds but was, as the district court found, based on relevant grounds.

claim is that the Union made a bad deal in settling with Continental. That complaint has nothing to do with the rationality of *differentiating between working pilots and striking pilots*; to the contrary its focus is on the rationality of *the decision to settle the Continental strike rather than to make an unconditional offer to return to work.* Plaintiffs' brief makes no bones about this; in their view it is enough for them to prove that the Union "treat[ed] all of its striking members equally badly." Resp. Br. at 23. As we proceed to show, neither precedent nor principle supports this extension of the duty of fair representation.

1 (a) The Solicitor General at least tacitly concedes that the seminal fair representation case, *Steele v. L&N.R. Co.*, 323 U.S. 192 (1944), states a unitary representational duty that rests on a duty of loyalty. As the Solicitor General acknowledges, *Steele* reasons "that 'the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf.'" U.S. Br. at 12, *quoting Steele*, 323 U.S. at 202. Indeed, as we noted in our opening brief, *Steele* "hold[s]" that a union has a representational duty to "*exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.*" 323 U.S. at 202-03 (emphasis added).

(b) The Solicitor General contends, however, that *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *sub silentio*, expands the fair representation law by adding a "duty of care." This reading of *Ford Motor* rests on the statement that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 337-38. According to the Solicitor General

> the quoted passage is . . . understood as recognizing two distinct branches of the duty of fair representation: the duty to avoid conduct that falls outside a "wide range of reasonableness," and the duty to avoid conduct that is not performed in "good faith and honesty of purpose." [U.S. Br. at 17]

This, we submit, misreads *Ford Motor*. The Court's opinion there first sets out the governing legal standard in the following terms:

> The statutory obligation to represent all members of an appropriate unit requires [unions] to make an *honest effort to serve the interests of all of those members, without hostility to any.* . . . The bargaining representative . . . is responsible to, *and owes complete loyalty to*, the interests of all whom it represents. [345 U.S. at 337-38 (emphasis added).]

The Court then went on to consider whether the union in that case had breached its duty of "*complete loyalty*" by entering into a collective bargaining agreement which, by granting seniority credit for military service, advantaged returning or newly-hired veterans as a class over non-veteran employees as a class.

The passage from *Ford Motor* on which the Solicitor General relies states the essence of the Court's response to this question; in fuller context what the Court said was

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose. [345 U.S. at 337-38]

Based on this reasoning, the Court concluded that the union "had authority to accept" the collective bargaining provisions at issue because the "provisions before us are within reasonable bounds of relevancy." *Id.* at 342-43.

Fairly read, then, the passage on which the Solicitor General relies is a passage elaborating on the duty of "complete loyalty." What *Ford Motor* teaches is that

unions are to be afforded a "wide range of reasonableness" in drawing distinctions among bargaining unit employees—and among classes of employees—and that distinctions that are within "reasonable bounds of relevancy" are to be respected. Put differently, *Ford Motor* states the test for determining whether such a distinction is legitimate or "irrelevant and invidious," *Steele*, 323 U.S. at 203.

Ford Motor does *not* suggest that where the union draws a legitimate distinction between classes of employees, the *substance* of each group's terms and conditions of employment is to be evaluated and that unions must defend the rationality of the substance of their negotiating judgments. It is of the essence that *Ford Motor* treats with the question of whether unions may negotiate an agreement advantaging veterans as a class (and disadvantaging non-veterans) and *not* with the question of whether the union did too much for veterans (and too little for non-veterans). Once the *Ford Motor* Court was satisfied that the answer to the first of these questions was "yes" the Court's inquiry was at an end.

(c) Nor, contrary to the Solicitor General, can a duty of adequate representation be derived from this Court's condemnation of "arbitrary discrimination" in *Humphrey v. Moore*, 375 U.S. 335, 350 (1964), and of "arbitrary conduct" in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). As we showed in our opening brief (at 23-24), those opinions use the phrase "arbitrary discrimination" and "arbitrary conduct" to refer to union conduct that singles out some members of a bargaining unit for disfavored treatment based upon "wholly [ir]relevant considerations," *Humphrey*, 375 U.S. at 350. *Humphrey* and *Vaca* thus further refine upon the duty of loyalty stated in *Steele* and *Ford Motor* and do not articulate a distinct "duty of care."

(d) Finally, it is noteworthy that in arguing that the duty of fair representation encompasses a "duty of care," the Solicitor General makes no attempt to treat with

Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). This silence with regard to *Lockridge*—which postdates the cases on which the Solicitor General relies—is pregnant with significance. And plaintiffs' attempt to dismiss *Lockridge's* fair representation discussion as "dictum," Resp. Br. at 21, n.22, is simply wrong: the Court in *Lockridge* ordered the dismissal of the complaint in that case; the statement that the duty of fair representation "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives," 403 U.S. at 301, is the basis for the Court's ruling that the plaintiff there could not proceed on a fair representation theory.[2]

2. Plaintiffs and the Solicitor General fare no better in their attempt to justify a duty of adequate representation as a matter of principle.

(a) Plaintiffs contend that such a duty is needed as a matter of policy to "ensure that [unions] do not abuse the trust placed in them." Resp. Br. at 19. The Solicitor General claims the duty is needed to reach a union which has "failed to fulfill its representation function." U.S. Br. at 20.

But the very point of the existing duty of fair representation is to prevent "abuses of trust," and that duty is fully adequate to the task. The office of the proposed duty of adequate representation is quite different: to address representation that is undertaken in honest good faith but allegedly falls short in securing benefits for the represented employees. And the Solicitor General completely begs the question by asserting that a union which has loyally but ineptly sought to further the interests of

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[2] Plaintiffs are also wrong in asserting that "the Court has never cited *Lockridge* as the proper standard of conduct in any duty of fair representation case." Resp. Br. at 21 n.22. Just last Term, in *Breininger v. Sheet Metal Workers*, —— U.S. ——, 110 S.Ct. 424 (1989), the Court relied extensively on *Lockridge*. *See* 110 S.Ct. at 432, *quoted* in Pet. Br. at 22 n.10.

those the union represents has somehow "failed to fulfill its representation function."

(b) Plaintiffs—with a hint of support from the Solicitor General, *see* U.S. Br. at 20—argue that "[i]rrational acts are often powerful evidence that a union's conduct is motivated by discrimination or bad faith" and that to "foreclose juries from examining the evidence and drawing the appropriate inferences in such cases is to virtually guarantee that such union conduct will never be remedied." Resp. Br. at 23-24. But we do not suggest for a moment that, in determining whether a union has breached its duty of loyalty, the courts should require "'smoking guns,'" Resp. Br. at 23, should "ignore irrationality," *id.*, or should be "foreclose[d] . . . from . . . drawing the appropriate inferences," *id.*

Our point is that, where the trial court has combed the summary judgment record and is persuaded, on the basis of all the evidence, that the union has *not* breached the duty of loyalty owed to all members of the bargaining unit, there is no room for a further judicial inquiry into the wisdom—or lack of wisdom—of decisions made by the union in seeking to advance the interests of those the union represents. Plaintiffs fail to offer any justification for such an inquiry.

(c) Plaintiffs and the Solicitor General rely heavily on analogies to other areas of the law, including trust law, agency law, and corporate law, to support their contention that the duty of fair representation encompasses a "duty of care." *See* Resp. Br. at 22-23; U.S. Br. at 12-13. That method of approach does not withstand scrutiny.

There are, to be sure, obvious similarities between the common-law relationships invoked by plaintiffs and the Solicitor General, and the statutory relationship between an exclusive representative and the members of the bargaining unit the union represents. But there are, as well, obvious *differences*: unlike the agent, trustee, or corporate officer, the union alone, as *Steele* recognizes, "is clothe[d] . . . with powers comparable to those possessed

by a legislative body both to create and restrict the rights of those for whom it legislates." 323 U.S. at 198. Because unions are empowered to exercise such a broad, discretionary authority—and to make political choices that profoundly affect the working lives of those the unions represent—a judicially-enforced duty of adequate representation would be *different in kind* from a similar duty in another context.

It is, thus, very much to the point that this case does *not* arise under the federal common law but under a specific piece of federal legislation, the Railway Labor Act. This Court's task is to interpret that quite specific enactment: The relevant question here, then, is not, as the Solicitor General suggests, what duties "the law" imposes on "one who performs a representative function," but rather what duties *the RLA* imposes on unions that assume the function of an exclusive representative under that statute. *Cf. Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 386-90 (1969).

Significantly, there is nothing in the brief of either plaintiffs or the Solicitor General that squarely confronts —much less answers—that question. Neither brief points to anything in the RLA's statutory language, history or policies to support the contention that Congress sought to regulate the quality of—in addition to the honesty of purpose of—union representation or to impose a judicially-enforceable "duty of care" on unions.

Indeed, the opposing briefs end up confirming our showing, Pet. Br. at 26-32, that the exercise of such a judicial power would be *antithetical to the premises of the collective bargaining system* established by the RLA (and the National Labor Relations Act, as amended). When all is said and done, what those briefs call for is a review of the *substance* of the bargain the Union struck here to determine whether that bargain is in some sense sound or adequate. U.S. Br. 13, n.21; Resp. Br. 15-16.

As we showed in our opening brief, subjecting collective bargaining agreements to such review would be *di-*

rectly contrary to the national labor policy. For that policy provides for private, rather than public, ordering of employment relations and does *not* allow for "government regulation of the terms and conditions of employment." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). The words of *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1979), bear quoting again: "If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution."

3. Finally, it is worth noting that the briefs of the plaintiffs and the Solicitor General confirm our contention that, in this unique context, there would be insurmountable practical difficulties in formulating—and in applying—a principled duty of adequate representation.

(a) In other contexts a duty of care is defined and enforced by measuring a defendant's conduct against the hypothesized conduct of a reasonably prudent person. Just last Term, however, this Court ruled that this is *not* an appropriate standard to apply in the fair representation context. *Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990). Thus, if a duty of adequate representation is to be imposed as part of the duty of fair representation, a novel standard would have to be invented by the courts—without any legislative guidance—to give content to that duty.

Plaintiffs turn to the dictionary, *see* Resp. Br. at 22 n.23, and the Solicitor General to the casebooks, *see* U.S. Br. at 16-17, in a search for such content. Using the dictionary definition of "arbitrary," plaintiffs suggest that while a union is not to be held to a reasonable person standard, the union is subject to liability if a jury finds that the union took action which was "not done . . . according to reason or judgment." And the Solicitor General posits that liability is not to turn on whether the union acted as a reasonable person but on whether the union exceeded its allowed "wide range of reasonableness."

Both "standards" are so general and so uninformative as to fail completely in providing guidance for the correct decision of concrete cases.

(b) The cardinal importance of such guidance—and the enormous risk to a sound labor relations system posed by a vague standard of care—is confirmed by the Solicitor General's brief. That brief carefully explains that in negotiating agreements such as the one at issue here, the union is charged with the

> critical function of accommodating conflicting interests among unit members, who often will share unequally in the duties and obligations the union is able to attain from the employer. Moreover, a union must be able to seize fleeting opportunities for reaching agreement and to respond quickly to management initiatives. And a union must act within constraints imposed by deadlines and scarce resources that can limit its ability to devote extensive study, investigation, and analysis to each action it takes. Finally, a union's decisionmaking—particularly during a strike—must be guided by essentially unverifiable assessments of whether the economic power it can wield will be sufficient to attain its objectives. [U.S. Br. at 17-18]

Against this background, the Solicitor General argues that the governing standard defining the duty of care "should be applied with keen sensitivity to the situation confronting the union at the time it acted," U.S. Br. at 19, and that it is of the essence that "judicial inquiry proceeds *ex ante* from the standpoint of the decisionmaker at the time of decision, and takes into account the constraints of time, limited information and limited resources under which the decisionmaker was operating," *id.* at 19-20.

While the compensating cautions suggested are all well and good, these are heroic demands to make of a legal system in which the working reality is that a decision as to whether a union breached its duty is necessarily made *post hoc* by persons—including, most significantly, lay jurors, *see Chauffeurs Local No. 391 v. Terry*, ——

U.S. ——, 110 S.Ct. 1339 (1990)—who are wholly outside the ongoing labor relations system.

A legal rule that demands of lay jurors such "keen sensitivity" to subtle situational nuance is a rule all too often doomed to fail. And it is this substantial likelihood of failure that unions will have to take into account in negotiating—and in administering—collective bargaining agreements. The defensive collective bargaining that will result will, we submit, do far more to restrict employee rights and interests than adding a "duty of care" to the present "duty of loyalty" could possibly do to expand those rights and interests. As the Court said in *Humphrey v. Moore*, 375 U.S. at 349-350: "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." [3]

II. THE SUMMARY JUDGMENT ISSUES

A. We demonstrated in our opening brief that ALPA's decision to settle the Continental strike was lawful under any interpretation of the duty of fair representation, including the interpretation adopted by the court of appeals in this case. Pet. Br. at 39-50. In response, plaintiffs all but abandon the Fifth Circuit's holding that a jury is entitled to decide that ALPA breached the duty of fair representation by "irrationally" agreeing to a strike settlement which was less favorable to the striking

[3] As we have emphasized throughout, *see* Pet. Br. 28-31, 34-36, the dangers to a well-functioning labor relations system posed by an undifferentiated "duty of care" are most acute with regard to the complex and delicate task of negotiating collective bargaining agreements—and strike settlement agreements—that set out the continuing rules that govern the parties into the future. The portions of the Solicitor General's brief just quoted in the text confirm that point. Thus, while we urge that the correct standard in all fair representation contexts is one of honesty and good faith, we urge, too, that, at a minimum, such a standard is essential in the negotiation context. *See Thomas v. United Parcel Service*, 890 F.2d 909 (7th Cir. 1989).

pilots than an unconditional offer to return to work. Instead, plaintiffs put their reliance on the argument that the record shows that ALPA must have known that the strike settlement was inadequate and that such a showing makes out a breach of the duty of fair representation. Resp. Br. 29-32. The record contains no support for that argument.

Plaintiffs discuss at more length in Part III of their brief the court of appeals' alternative holding that the strike settlement provisions embodied in the order and award that governed the striking pilots' opportunities to return to work after the strike constitute unlawful discrimination. In this regard, plaintiffs continue to ignore this Court's conclusion in *TWA v. IFFA*, —— U.S. ——, 109 S.Ct. 1225, 1231-32 (1989) that the RLA does *not* prohibit the post-strike continuation of job assignments conferred upon permanent replacements during a strike.

1. The order and award provided benefits to the strikers with a level of certainty and enforceability that could not have been obtained through an unconditional offer to return to work.[4] ALPA was, moreover, faced with a number of circumstances in August, September, and Octo-

[4] The order and award provided almost immediate recall in seniority order to seventy captain positions covered by the 85-5 bid, guaranteed the pay of pilots who were not recalled to captain positions in keeping with an agreed schedule, guaranteed full restoration of seniority rights as qualified pilots were returned to their pre-strike positions, provided a judicial enforcement mechanism, waived Continental's right to refuse reinstatement to any pilot who had obtained substantially equivalent employment elsewhere, and obtained the right of pilots who did not wish to return to Continental to receive $4,000 of severance pay per year of employment at Continental ($2000 for pilots furloughed before the strike). None of these opportunities would have been available under an unconditional offer to return. Also, and contrary to plaintiffs' assertion, Option 1 pilots were not required "to exercise a waiver of all claims against Continental." Resp. Br. 12. Those pilots were entitled to recover on claims for pre-petition wages, pre-petition medical claims, unused vacation and pre-petition reimbursable expenses. J.A. 27.

ber 1985 that made a negotiated resolution of the strike the best option.[5]

Contrary to plaintiffs' assertions (Resp. Br. 29), the record makes it clear that the ALPA negotiators were motivated by these circumstances—all of which were undisputed and all of which created legal uncertainties with which the Union had to come to grips—to pursue a negotiated resolution which guaranteed as many jobs as possible, with full protection of seniority rights after the strikers returned to work. *See*, R. 131, Higgins Affidavit ¶¶ 7-8; Henderson Dep. at 171-76, 190-91, 460; Schnell Dep. at 903-905, 1144-46, 1453-54, 1829-45, 1965-66; Lappin Dep. at 368-71, 386-87, 598-99, 606-07, 663. The record establishes, as well, that ALPA sought in particular to negotiate for maximum seniority protection for the striking pilots on a return to work (Schnell Dep. at 849, 893-94), and that in response Continental's negotiators took the position that the 85-5 bid positions were legally filled and no longer available for returning strikers (Gallagher Dep. at 208-10; Schnell Dep. at 888, 1848).[6]

The record in the district court established that the ALPA negotiators concluded that they had secured from

[5] At that time, the strike had lasted two years with little economic effect on Continental, the number of permanent replacements exceeded the strikers, the collective bargaining agreement had been abrogated with court approval, Continental had withdrawn its recognition of ALPA, and Continental was acting to fill all of its vacancies in a manner intended to prevent any striking pilots from returning to work for years to come.

[6] Plaintiffs argue that ALPA has relied upon deposition testimony which is not part of the record. Resp. Br. at 29 n.28. This argument was made in their Motion to Strike Record References contained in ALPA's Petition for Rehearing to the Fifth Circuit. That motion was denied by the Fifth Circuit by order dated December 27, 1989, holding that "this material is in the record." No further review of that decision was sought. Plaintiffs' companion assertion that ALPA did not even argue to the district court that the Union had fulfilled its duty of fair representation to the striking pilots (Resp. Br. 5 n.7 and 29 n.28) is equally frivolous. *See* R. 132 at 47-48; R. 153 at 7-8, and R. 165 at 18, 24-27.

Continental all the concessions that the company was prepared to make, achieving a back-to-work agreement that contained benefits otherwise unavailable, including many of the 85-5 bid positions previously awarded to non-striking pilots. *See, e.g.* Henderson Dep. at 195-96; Higgins Dep. at 885-86; Schnell Dep. at 1051; Lappin Dep. at 598-607. All of these facts, presented to the district court on a full summary judgment record, led that court to conclude that the settlement was "the best deal that the Union thought it could construct. . . ." J.A. 74.

The court of appeals did *not* disturb the district court's conclusion in this regard. The Fifth Circuit instead reasoned that ALPA's best efforts could be judged "irrational" on the grounds that strikers would have been entitled to greater benefits by unconditionally returning to work and litigating their statutory recall rights. J.A. 89-92. As the Solicitor General points out, the court of appeals' analysis of the governing law is fatally flawed (U.S. Br. 21-26), and plaintiffs offer no serious defense of the Fifth Circuit's application of its duty of fair representation theory to this case.

The record below establishes that the negotiators' concerns about an unconditional offer to return to work were entirely justified: Continental had abrogated the collective bargaining agreement (with its assurances of seniority), withdrawn its recognition of ALPA, and sued to void the strikers' bids under the 85-5 vacancy bid. Continental's intransigence promised uncertainty and litigation at every turn if an unconditional return to work had been made without a back-to-work agreement enforceable in the bankruptcy court. ALPA's concern about the state of the law at the time was not irrational or arbitrary under any standard.[7]

[7] In our opening brief, we demonstrated that the law regarding recall rights in the circumstances existing in October, 1985 was uncertain at best. Pet. Br. 41-50. We add only that, contrary to plaintiffs' assertions, Resp. Br. at 30, ALPA's counsel in the *ALPA v. United Air Lines* case did warn the negotiators that the law was uncertain at the time, and that they could not be sure that the

2. Plaintiffs' argument that the order and award constitutes unlawful discrimination against the striking pilots is no stronger. Some 218 new captain positions and over 200 first officer positions had been awarded to working pilots through the 85-5 vacancy bid, and Continental continued to hire permanent replacement pilots to fill entry level second officer positions. Continental also refused to accept 85-5 bids from striking pilots, claiming that the bids were fraudulent and refused to recognize ALPA.

Against this background, ALPA sought a means to *gain* job rights for the strikers. The Union succeeded in

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ALPA v. United decision, which involved very different facts, would be of any help if litigation with Continental followed. Schnell Dep. at 1839-45.

Plaintiffs seize on the deposition testimony of another of ALPA's attorneys in an attempt to create the impression that ALPA's negotiators should not have concluded that their rights under an unconditional offer to return to work were less than certain. Resp. Br. 8, 9, 30. The testimony does not support that assertion. Instead, ALPA's attorney testified that despite any indication to an ALPA representative that Continental would permit pilots to return in seniority order in an unconditional return, R. 163 Att. 5.5 at 166-69, he warned the negotiators that "Lorenzo might play games" with the normal rules under an unconditional offer to return to work, *id.* at 160-61, and that Continental might not recognize an unconditional offer to return to work because Continental no longer recognized ALPA as the pilots' bargaining representative. *Id.* at 161-2.

Throughout their discussion of the recall issue, moreover, plaintiffs artfully confuse two distinct recall issues—the right of striking pilots *rel nos* to pilot positions at the conclusion of a strike (including the 85-5 bid positions awarded to permanent replacements), and the method governing the order of recall to those pilot vacancies that are available to strikers at the end of the strike. Plaintiffs' only claim is that an ALPA attorney believed that Continental would employ seniority as the governing principle for recalling strikers to *vacant or available* pilot positions after the strike. Plaintiffs do not (and cannot) claim that anyone advised ALPA that Continental planned to rescind its award of the 85-5 bid positions to permanent replacements in order to *create* pilot vacancies for strikers in an unconditional return to work. In fact, it is undisputed that Continental's intent was to refuse to award *any* of the 85-5 bid positions to striking pilots at the end of the strike. Continental Br. 21 n.22.

negotiating for an arrangement whereby a significant number of positions that had previously been awarded to permanent replacements were awarded to striking pilots. To obtain that benefit, ALPA agreed to a job allocation mechanism that, for a brief transitional period after the strike, limited the available vacancies for which returning strikers could bid. Although some individual working and striking pilots ended up in different positions from those they would have occupied had the 85-5 bid positions been awarded entirely to one group or the other, the result plainly compromised the working pilots' claims to all of the 85-5 bid positions, as well as the striking pilots' uncertain claims. Plaintiffs state that this aspect of the order and award permitted Continental to treat former strikers and permanent replacements "differently" in some respects. Resp. Br. 40-44. Yet they offer no rationale, as they must under *Steele*, for concluding that the tradeoffs ALPA made in bargaining to obtain a portion of the 85-5 bid positions for strikers were based on irrelevant or invidious considerations or somehow imply that ALPA was bent on harming strikers and favoring strike replacements.

Nothing in that compromise solution is contrary to this Court's holding in *NLRB v. Erie Resistor*, 373 U.S. 221 (1963). In *Erie Resistor*, the employer unilaterally granted 20 years of seniority to all non-strikers as permanent protection from future layoffs thereby putting before the Court a practice that created a "cleavage in the plant continuing long after the strike is ended" that "with each subsequent layoff . . . stands as an ever-present reminder of the dangers connected with striking and with union activities in general." *Id.* at 231.

In contrast, the order and award did *not* affect seniority for purposes other than the allocation of the 85-5 bid positions and of future captain positions for a brief transitional period at the end of the strike; such matters as future layoff and recall procedures, employee benefits, and the like, were *not* affected. The fact that normal seniority rules prevailed in these other respects demon-

strates that, in contrast to the employer's conduct in *Erie Resistor*, ALPA's conduct here was designed to enhance the strikers' seniority rights. As such, the provisions of the order and award cannot be viewed as the kind of interference with the exercise of the right to strike condemned in *Erie Resistor*, much less as the hostile or invidious discrimination condemned in *Steele*.

B. Plaintiffs also seek to show that, even if the law was uncertain and Continental was intransigent, ALPA still breached the duty of fair representation through other "misconduct." Resp. Br. 32-39. All of their arguments along this line were rejected by the district court which found that there was no evidence of misconduct, J.A. 74, 75; a finding that was *not* disturbed by the court of appeals.

1. ALPA did not exceed its authority by resolving the strike through a negotiated order and award of the bankruptcy court. Resp. Br. 33. The district court held that the governing union documents conferred "a plenary binding general agency" on the negotiators to reach an agreement without ratification. J.A. 74-75. The Fifth Circuit affirmed this holding in concluding "that the union members had no right to approve the settlement embodied in the order and award." J.A. 97. Because plaintiffs did not file their own petition for *certiorari*, that holding is final and binding.[8]

Plaintiffs also claim that ALPA had made promises of membership ratification to some pilots during the strike but failed to keep those promises. Resp. Br. 33. This allegation is found, however, only in Count IV of the amended complaint (J.A. 55), which was dismissed by the district court, and never appealed to the Fifth Circuit.

Plaintiffs continue to argue that the MEC should also have been given the opportunity to ratify the order and

[8] Arguments made by plaintiffs now (Resp. Br. 3, 33), that there was a 1983 MEC resolution passed prior to the strike requiring ratification of any concessions made to Continental were specifically and at length rejected by the court of appeals. J.A. 95-96.

award. Resp. Br. 33. Again, the district court's conclusion that ALPA's governing documents fully authorized the negotiators to do exactly what they did (J.A. 74-75), is fully supported by the record. It is undispued that (a) the ALPA Constitution left to the discretion of the MEC whether MEC ratification would be necessary (R. 131 Higgins Aff. ¶ 13 and Exh. G); and (b) the last MEC resolution addressed to the issue of ratification was adopted on August 24, 1984 and provided that the negotiating committee was authorized "to conclude a strike settlement as a product of negotiations and/or the use of a third party process, *without ratification*," (R. 131, Higgins Aff. ¶ 15 and Exh. I (emphasis added)). MEC ratification simply was not required. Higgins Dep. at 1004, 1019; Schnell Dep. at 1348, 1997; Henderson Dep. at 400; Lappin Dep. at 409-10, 560.[9]

In light of this summary judgment record, the court of appeals had no basis for "accepting for these purposes the pilots' interpretation of the union policy . . . ." J.A. 96 n.4. *See Newell v. Int'l Bhd. of Elec. Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986) (union's interpretation of its own constitution and policy guidelines must be accepted by the court unless "patently unreasonable").

2. ALPA did not try to disguise the negotiated order and award. *Cf.* Resp. Br. 34. Continental was "an indisputably . . . hostile, intransigent employer" (J.A. 75),

[9] Plaintiffs allege that a resolution passed at the September 1985 MEC meeting limited the negotiators' authority. Resp. Br. 7. First, the language of the resolution did not contain any such limitation ("settlement of outstanding issues [to] be pursued under the direction of the MEC officers and Negotiating Committee Chairman"). Second, nothing in that resolution limited the authority granted in the August 1984 resolution quoted in the text, a resolution that expressly authorized a strike settlement without ratification. Third, the negotiators each testified that they had authority to conclude a settlement without MEC approval. Higgins Dep. at 1004, 1007, 1019; Schnell Dep. at 1348, 1997; Henderson Dep. at 400 and Lappin Dep. at 409-10, 560. Finally, the two contrary affidavits relied upon by plaintiffs were nothing more than inadmissible conclusory "understandings." R. 149, Ex. 67, Ex. 48.

that did not recognize ALPA as the pilots' bargaining representative. The order and award gave the negotiators the critical comfort of an enforcement mechanism in the bankruptcy court. There was no desire to disguise anything. The Union sought an order and award and that is what the Union obtained. Schnell Dep. at 1610-11; Higgins Dep. at 842.

3. ALPA did not defeat union democratic process by placing the MEC in custodianship. *Cf.* Resp. Br. 35-37. If the majority of a bargaining unit believes that their union has not been effective, they can select a new union to represent them; putting the MEC into custodianship, in order to have a formal entity which could represent the pilots' interests under the order and award, had *no* effect on the bargaining unit's ability to use this democratic process to "throw the rascals out."

In any event, plaintiffs' claim that ALPA improperly imposed a custodianship *after* the Union concluded the order and award is irrelevant to whether ALPA breached its duty of fair representation by entering into the order and award. Plaintiffs' duty of fair representation claim concerns ALPA's conduct in reaching the strike settlement, *not* the Union's conduct affecting plaintiffs' right to vote for a particular candidate in ALPA's national election. Plaintiffs recognized as much when they alleged that the custodianship deprived them of their voting rights only in Count III of their complaint (J.A. 54-55), alleging a breach of fiduciary duty under the Landrum-Griffin Act, 29 U.S.C. § 501, and not in Count I alleging a breach of the duty of fair representation. Count III was dismissed by the district court and plaintiffs never appealed that dismissal.[10]

[10] Plaintiffs imply that the negotiators' judgment was affected by President Duffy's promises of high-paying employment by the custodian group. Resp. Br. 15 n.19. In fact, however, the testimony was undisputed that the custodianship positions were discussed only *after* the entry of the order and award on October 31, 1985. Schnell Dep. at 1763-64; Lappin Dep. at 634, 761; Henderson Dep. at 84-86; Higgins Dep. at 66, 112-13.

4. Nor did ALPA breach its duty because pilots who retired or resigned during the strike were excluded from the agreement. Resp. Br. 3-4, 37 n.34. Once those pilots retired or resigned, they were no longer members of the bargaining unit. And "[s]ince retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 181 n.20 (1971). Moreover, at every opportunity, strikers were warned that, although ALPA had every intention of trying to include in a settlement pilots who retired or resigned, their legal status was very uncertain, and that retirement or resignation most likely meant they would not be included in a settlement. Higgins Dep. at 622, 630-31; Henderson Dep. at 698-99; Lappin Dep. at 741-42.[11]

5. Based on nothing more than vague allegations that the strike had become an "obvious blemish" on ALPA President Duffy's record (Resp. Br. 38-39), plaintiffs assert they have adduced sufficient evidence of hostility to create issues of fact as to ALPA's motive and intent in negotiating a settlement rather than simply concluding the strike with a return to work. Viewed in their most favorable light, such conclusory assertions are insufficient to reverse the finding by the district court that there was no evidence of "personal animosity or illegal motives against these pilots" (J.A. 76), a finding left undisturbed by the court of appeals.

In cases where the defendant's state of mind is at issue, as in other cases, a plaintiff opposing summary judgment "may not rest upon mere allegation . . . but must set forth

[11] Against this undisputed deposition testimony the plaintiffs have cited part of a letter to one pilot written by President Duffy in September 1985, expressing ALPA's "intention to represent all CAL pilots." Resp. Br. 4 n.5. The letter makes clear, however, that pilots risked losing their rights by retiring. Thus, the letter states that Continental "has taken a very rigid position against pilots who have already retired," and that "[i]t is one thorny issue that will be difficult to settle. . . ." R. 149 Ex. 91.1.

specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Asserting that the strike was an "obvious blemish on Duffy's record as ALPA president and a threat to his reelection" (Resp. Br. 38), without even a record citation, cannot support a nonspeculative inference of bad faith, particularly in the face of a summary judgment record that establishes that President Duffy offered his uncompromising support to the strike and the Continental MEC. Henderson Dep. at 481-83; Lappin Dep. at 653-656; Higgins Dep. at 959-60.[12]

C. To defeat a motion for summary judgment, the nonmoving party must do more than show "some metaphysical doubt as to the material facts." *Matsushita Electric Indus. v. Zenith Radio Corp.*, 475 U.S. 575, 586 (1986). Once ALPA carried its "initial responsibility" of identifying those portions of the summary judgment record demonstrating "the absence of a genuine issue of material fact," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the plaintiffs, as the party opposing summary judgment, had to make a showing "sufficient to establish the existence of [each] element essential to that party's case, and on which [they would] bear the burden of proof at trial, *id.* at 322. Plaintiffs failed completely to meet their burden under FRCP Rule 56.

CONCLUSION

For the reasons stated in petitioner's opening brief and above, the decision below should be reversed and remanded with instructions to reinstate summary judgment for the petitioner.

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[12] Similarly, the fact that the order and award required the dismissal of eighteen pieces of litigation between ALPA and Continental, including a libel action in Australia against Chairman Higgins and a television station, does not raise "a further issue of personal gain and bad faith," as plaintiffs assert. Resp. Br. 39 n.36. Such speculation is insufficient to defeat summary judgment (*Matsushita Electric Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 596-97 (1986)), and is unsupported by the record (Higgins Dep. at 757-64).

Respectfully submitted,

HAROLD G. LEVISON
Counsel of Record
MICHAEL C. HARWOOD
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, NY 10038
(212) 510-7000

DAVID SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner
Air Line Pilots Association

Of Counsel:
GARY GREEN
1625 Massachusetts Ave., N.W.
Washington, D.C. 20036

JOHN A. IRVINE
921 Main Street
Houston, TX 77012